No. 3676

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE ROSS-HIGGINS COMPANY,
Plaintiff in Error,

vs.

L. F. PROTZMAN and F. S. GORDON,
Defendants in Error.

REPLY BRIEF ON BEHALF OF DEFENDANTS IN ERROR

FILED
OCT 25 1921
F. D. MONCKTON,
CLERK

KERR, McCORD & IVEY,
JAMES A. KERR,
Attorneys for Defendants in Error.

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

No. 3676.

THE ROSS-HIGGINS COMPANY,
Plaintiff in Error,

vs.

L. F. PROTZMAN and F. S. GORDON,
Defendants in Error.

Brief on Behalf of Defendants in Error.

STATEMENT.

This action was commenced by plaintiff in error, an Oregon corporation, in the District Court of the United States, Fourth Judicial Division of Alaska, on April 17th, 1911. The issues were framed and it was allowed to remain untried until May 1st, 1919. As shown by the transcript May 1st, 2nd, 6th and 7th were devoted to the trial. Plaintiff in error has not brought to this court the evidence upon which the cause was determined, but now seeks a reversal of the judgment upon technical grounds

and upon assumptions which are negatived by the Findings of Fact of the trial court. He seeks to inject into the case one or more questions neither within the issues nor presented to or passed on by Judge Bunnell. The whole fabric of his argument is based upon a line of cases that have no bearing whatever on the statutes of Alaska which declare the contract of a non-complying foreign corporation "void and unenforceable."

The trial court found:

1. That plaintiff was a foreign corporation; that in 1906 and 1907 it conducted a mercantile business at Fairbanks in the Fourth Judicial Division; that it sold during said period to one Ohlsen merchandise, and received payments on accounts thereof until in August, 1907, when Ohlsen owed it a balance of $1689.72; that it did not at any time file in the office of the clerk of the District Court of said division of the territory of Alaska a duly authorized copy or any copy of its charter or articles of incorporation, nor any other statement required by law, excepting its annual report for the year 1906. (Record, pp. 70, 81, Findings of Fact 1 and 4.)

The trial court found (II Findings of Fact, p. 70, Record) that Peter Vachon prior to April 7th, 1908, was a merchant at Fairbanks and had sold merchandise to Ohlsen for which he was indebted in the sum of $1418.92, and that on April 7th he applied to

Vachon for more goods, agreeing to execute a mortgage on his stock for the purchase price; that Vachon then sold him additional goods of the value of $2,433.15, and received from Ohlsen and forthwith placed of record such mortgage; that Ohlsen continued to sell the goods covered by the mortgage in the usual course of his business, kept an account of sales and paid to Vachon at intervals of one or two weeks the proceeds of such sales, less small amounts kept for making change; that this continued until August 27th, 1908, at which date his indebtedness to Vachon had been reduced in the sum of $603.92.

The court further found:

That on August 20th, 1908, plaintiff commenced an action against Ohlsen for goods sold him and in 1911 recovered a judgment for $1404.85; that in said action plaintiff caused a writ of attachment to issue against the property of Ohlsen; that on August 27th, 1908, a deputy marshal "went with the writ to Ohlsen's place of business and made a memorandum of goods found in his store building and then left the store building and the goods therein contained and did not remove any part of said goods nor place any person in charge thereof, and did not take any of said goods into his custody"; that the value of the goods was $1900; that thereafter Ohlsen delivered the possession of the goods to Vachon, be-

ing the goods covered by his mortgage, and Vachon sold them for the best price obtainable, which was insufficient to pay the sums due Vachon.

Ten days after the visit of the marshal to Ohlsen's place of business, defendants in error executed and delivered to the marshal a forthcoming bond (Record, p. 10), upon which this action is predicated.

The conclusions of law of the trial court, found on page 82, Record, are:

That plaintiff while carrying on business at Fairbanks failed to comply with the laws of Alaska relating to foreign corporations and that the court was prohibited from enforcing its said claim; that the bond was given without consideration, was invalid and unenforcable; that no valid attachment was made or effected.

ARGUMENT.

The first, and we think the decisive, question in this case arises upon the proper construction of Section 660, Code of Alaska, to-wit:

"If any such (foreign) corporation or company shall fail to comply with any of the provisions of this chapter, all its contracts with citizens of the district shall be *void* as to the corporation or company *and no court of the district, or of the United States, shall enforce the same in favor of the corporation or company so failing.*" (Italics ours.)

Under the language of this statute the non-com-

plying corporation cannot *begin* or *maintain* any action on any such contract. The statute itself deprives the court of jurisdiction.

"A state in which a foreign corporation—other than one engaged in interstate or foreign commerce or which is employed by the federal government—may require it to become a domestic corporation before it engages in business in the state."

8 Fletcher Cyc. Corp., Par. 5708.

"As has been seen elsewhere, while a corporation may be authorized and permitted to exercise its powers in another state than that by which it was created, this is not a matter of absolute right, but depends upon the express or implied consent of the other state, and it is a matter of comity. It is well settled, therefore, that a state may exclude a foreign corporation altogether from doing business or acquiring property within its limits, or it may impose any conditions or restrictions which it may see fit to impose, provided it does not thereby violate any of the provisions of its own constitution or of the Constitution of the U. S."

8 Fletcher Cyc. Corp., Par. 5894.

"Territorial legislatures, under their general legislative powers, may exclude foreign corporations from, or impose conditions upon those doing business within their territorial limits.

Empire Co. v. Tombstone Co., 100 Fed. 910.

The statutes of the several states are variant in the provisions and requirements, and as to the terms, conditions, penalties, etc., under which foreign corporations may carry on business within the state. The reasonableness of these statutory provisions is immaterial and it is the duty of the courts to enforce them.

"The power of a state to exclude foreign corporations from doing business or exercising any other powers within the state, is absolute and its motives in doing so or the means by which it does so are entirely immaterial so long as no constitutional provisions are violated."

8 Fletcher, 5895.

Security Co. v. Prescott, 202 U. S. 246.

Doyle v. Ins. Co., 94 U. S. 535.

State v. Ins. Co., 171 S. W. 874.

In Section 5941 Fletcher classifies the statutes of the several states under ten headings. In subdivisions six and seven he groups the statutes which declare contracts made by a non-complying foreign corporation as "void," "unenforcible," "wholly void," and denies to such corporations right of access to the courts.

Under other subdivisions he classifies the statutes which merely deny such corporations the right to resort to the courts. It is under this subdivision that this court will find the cases cited by counsel

for plaintiff in error. After commenting upon the variance in statutes, Fletcher says:

"Of course the question depends primarily upon the terms of the particular statute, and the intention of the legislature."

"All contracts made within the state which constitute the doing of business within the meaning of the statute (making the contract void) *are absolutely void and no action can be maintained by the corporation thereon*" (italics ours), citing many cases.

The statute of Wisconsin provides that the contracts of a non-complying corporation "shall be "wholly void on its behalf," etc. The provision is in almost the same language of the Alaska code. The Supreme Court of Wisconsin, in *Ashland Co. v. Detroit Salt Co.*, 114 Wis. 66, holds that "these words mean what they say and render the contract void and a nullity, and not simply void at the option of the other party to the contract." Florida has a like statute and its court followed the same doctrine.

Bank v. Jordan, 71 Fla. 566.

In oral argument we called attention to *Bank v. Parker* (Utah), 12 A. L. R. 1373, not only holding a contract under a like statute void, but holding that a negotiable note taken by the corporation in settlement under such a contract could not be enforced by an innocent purchaser. The Utah court say: "At-

tempted judicial construction of the unequivocal language of a statute serves only to create doubt and to confuse the judgment. There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses and no room is left for construction," citing cases.

The contract of plaintiff in error is declared by Section 660 "*void* as to the corporation and no court of the district or of the United States shall enforce the same." This court is asked to nullify this statute upon the theory that the word "void" as used therein is an "epithet."

In *Katz v. Herrick*, 12 Idaho 1, in construing the words of the statutes of that state, to-wit: "absolutely null and void," the court say:

"The purpose and spirit of these provisions indicate a clear intent to make such contracts unlawful. It would hardly be consonant with the duties of the courts and the office of the judicial department of the state to uphold and enforce contracts of corporations or individuals that have transacted business in the manner and under the conditions which both the framers of the constitution and the legislative department of the state have said shall be unlawful * * * The corporations that have transacted business without observing the legal requirements are therefore left without a remedy for enforcement

of such contracts."

Referring to subdivisions 6 and 7, Fletcher says, Par. 5995: "It is held that the prohibition in the statute against maintaining an action (italics ours) *implies a prohibition against beginning it, for the beginning of an action is one of the necessary steps in maintaining it,* and the word "maintain" as used in the statute is construed to be practically synonymous with "bring" or "begin."

In the Heilman case, 88 N. W. 441, it was contended that the statute did not prohibit the commencement of the action and that an after compliance might be resorted to, but the Minnesota court said:

"We cannot accept this construction of the statute, for a prohibition against maintaining an action implies a prohibition against beginning it, for the beginning of an action is one of the necessary steps in maintaining it. More than that, the construction of the statute urged on behalf of plaintiff would invite the very evil it was intended to prevent." Again: "The most efficient way to compel obedience to this statute is to enforce it as it reads and not to amend it by judicial construction so as to enable a foreign corporation to avoid the consequences of a non-compliance with its terms by complying after the penalties had been incurred."

The failure of plaintiff in error to comply with

the Alaska statute is put beyond controversy by the findings of the trial court. It follows accordingly that its contract for sale of merchandise to Ohlsen was void; that it could neither "begin" nor "maintain" an action against Ohlsen and that Judge Bunnell properly concluded as matters of law: That plaintiff was prohibited by the statute from enforcing a claim for goods sold, or against defendants in error; that the attachment was wrongfully issued and void; and, that the forthcoming bond was accordingly invalid and unenforcible.

In the Brief of plaintiff in error, p. 13, it is asserted, in the absence of the evidence, that the proofs did not show that defendants in error were citizens of Alaska. We might assert with equal emphasis that the contrary was the fact and that Protzman, Gordon and Vachon (who caused the bond to be executed) were all "old-timers," residents for years and citizens residing at Fairbanks. Even if they were not citizens, that fact would not give plaintiff in error the right to wage a suit under the statute.

1st. Protzman and Gordon in qualifying on the bond September 6th, 1908, under oath stated they were "residents and property owners of the territory," etc. September 17th, 1915, Protzman verified the amended answer at Fairbanks.

2nd. Judge Bunnel was never called upon to determine the question of their citizenship. No such

issue was raised in the trial court. Plaintiff in error requested no findings of fact.

3rd. In the motion for a new trial no such question is suggested.

4th. No error is assigned on the failure of the court to find they were citizens.

5th. No exception was taken by reason thereof

It was an after-thought, pure and simple, and is not in this case.

The second question involved in this appeal arising upon the finding of the trial court (Record, p. 81) that there was no levy of the writ of attachment upon the goods of Ohlsen. The marshal "went with said writ" to "Ohlsen's place of business and made a memorandum of goods found in his store building; then left the store building and the goods therein; did not remove any part thereof nor place anyone in charge thereof, nor take them into his own custody." The marshal visited Ohlsen's store August 27th, 1908. Ohlsen delivered the goods to Vachon, who held a chattel mortgage on them. Vachon sold them for an amount less than the sum due him. In the absence of the evidence it cannot be determined when Vachon sold the goods.

On September 7th, 1908, the forthcoming bond was executed by defendants in error at Fairbanks. There is no evidence that the stock was then in Vachon's hands or that the marshal was threatening

to attempt to seize it.

The trial court not only held the attempted attachment void, but that there was no consideration for the bond.

"Goods and chattels are attached by the actual taking of them by the sheriff from the possession of the debtor and transferring them to the control of the court."

Waples on Attachment, Par. 283.

"Since the taking is preliminary to execution, it is important that the property should be actually taken and held as if the seizure were made after judgment under a writ of execution."

Idem. 286.

Where the attachment proceedings are void, the obligors on release bond are not precluded from attacking the attachment is well settled by cases cited, in the opinion of Judge Bunnell.

"A judgment which is not founded on an actual debt or other legal liability due or enforible at the time of its entry will not be upheld against the creditors of the judgment debtor."

Black on Judgments, Par. 293, 295.
Palmer v. Martindale, 10 At. 802.

The trial court correctly decided both questions, although the decision of the first rendered a decision of the second unnecessary. We respectfully submit the judgment should be affirmed.

KERR, McCORD & IVEY,
JAMES A. KERR,
Attorneys for Defendants in Error.